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No. 85-1789

In The

Supreme Court of the United States

October Term, 1985

ROBERT JOHN WINICKI and
ANDREW ALEXANDER STRAUSS,
on behalf of themselves and all others similarly situated,
Petitioners,

vs.

ROBERT A. MALLARD, individually and in his capacity as the Property Appraiser of Duval County, Florida,

on behalf of himself and all others similarly situated;

LYNWOOD ROBERTS, individually and in his capacity as the Tax Collector of Duval County, Florida,

on behalf of himself and all others similarly situated;

RANDY MILLER, individually and in his capacity as the Executive Director of the Department of Revenue of the State of Florida,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE PRINCIPLE OF COMITY BARS A TAXPAYER'S 42 U.S.C. § 1983 DAMAGE ACTION BROUGHT IN FEDERAL COURT CHALLENGING THE CONSTITUTIONALITY OF A STATE TAXING STATUTE WHEN THE TAXPAYER HAD A PLAIN, ADEQUATE AND COMPLETE REMEDY IN STATE COURT?

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SUPPLEMENTAL STATEMENT OF THE CASE

The respondents, Robert A. Mallard, Property Appraiser of Duval County, Florida; Lynwood Roberts, Tax Collector of Duval County, Florida; and Randy Miller, Executive Director of the Department of Revenue of the State of Florida, supplement the petitioners' (or "taxpayers") Statement Of The Case with the following clarifications of petitioners' facts which more accurately describe the history of the litigation now before this Court:

1. On the defendants sued by taxpayers Winicki and Strauss: On July 7, 1982 Winicki and Strauss, and the class they purport to represent, sued Robert A. Mallard, Property Appraiser of Duval County, Florida, on the behalf of himself and all others similarly situated; Lynwood Roberts, Tax Collector of Duval County, Florida, on behalf of himself and all others similarly situated; Randy Miller, Executive Director of the Department of Revenue of the State of Florida; and Jim Smith, Attorney General of the State of Florida. Winicki v. Mallard, 783 F.2d 1567, 1568 (11th Cir. 1986). Attorney General Smith was later dropped from the suit, leaving the Duval County Property Appraiser and Tax Collector, and the Executive Director of the State Department of Revenue. Neither the plaintiff nor the defendant class was ever certified. Winicki v. Mallard, 615 F.Supp. 1244 (M.D. Fla. 1985).

2. With respect to the Tax Injunction Act issue: The United States Court of Appeals for the Eleventh Circuit stated that "[i]n view of our disposition of this case we need not reach the applicability vel non of the Tax Injunction Act." Winicki v. Mallard, 783 F.2d 1567, 1571 n. 2 (11th Cir. 1986).

3. On the litigants before the state court in Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982): This was not a class action. The plaintiff/taxpayers were Richard J. Osterndorf and Pauline F. Osterndorf. Osterndorf v. Turner, 411 So.2d

330, 331-332 (Fla. 5th DCA 1982).

4. On the monetary relief granted by the state court in Osterndorf v. Turner: The Florida Supreme Court granted a tax refund to Richard and Pauline Osterndorf, the litigants before it, and to "any other litigants who have timely judicially challenged the statute." 426 So.2d at 545. The Osterndorf court did not name or limit by specific number the qualifying litigants.

5. On the lack of a ruling on the instant petitioners' federal claims: In the state court action styled Winicki v. Mallard, in which one of the instant class representatives, Robert John Winicki, was the only plaintiff, the state circuit court ruled on September 29, 1982 that the state taxing statute (called Homestead Exemption Statute by petitioners) violated the right to equal protection under the United States Constitution, Winicki v. Mallard, 615 F.Supp. 1244, 1246 (M.D. Fla. 1985). The defendants appealed. During the pendency of the appeal, the state supreme court held the taxing statute unconstitutional under the equal protection clause of the Florida Constitution; therefore, it did not address the statute's constitutionality under the equal protection clause of the fourteenth amendment and the privileges and immunities clause of the United States Constitution. Osterndorf v. Turner, 426 So.2d at 544. Shortly thereafter, the state appellate court in Winicki v. Mallard affirmed the state circuit court opinion holding the statute unconstitutional "on the authority of and for the reasons enunciated in Osterndorf v. Turner, 426 So.2d 539 (Fla. 1983). Winicki v. Mallard, 615 F.Supp. at 1246. Later, when plaintiff Winicki sought an award of attorney's fees in state court, the Florida appellate court cited the previous state court holdings in Winicki v. Mallard, 436 So.2d 926 (Fla. 1st DCA 1983) and Osterndorf v. Turner, 426 So.2d 539 (1983), noting that both state courts ultimately relied on state grounds to invalidate the statute, and denied Winicki's state court request for attorney's fees. Winicki v. Mallard, 441

So.2d 693, 694 and 696 (Fla. 1st DCA 1983).

6. On the district court's dismissal of the petitioner/taxpayers' complaint and the application of the comity doctrine: The United States District Court for the Middle District of Florida (hereinafter "district court") dismissed the complaint because a review of available state remedies demonstrated that the taxpayers had a choice of remedies under Florida law which were "plain, adequate and complete," Winicki v. Mallard, 615 F.Supp. at 1248; because of the concomitant respect that should be accorded state tax laws in federal court," 615 F.Supp. at 1248; and, as petitioners state in their Statement of the Case at page 5, because of the "chilling effect" of such a refund "upon the fiscal operation of state government." Id.

7. On the court of appeals' findings in support of its affirmance of the district court: The United States Court of Appeals for the Eleventh Circuit (hereinafter "court of appeals") affirmed the district court for all of the following reasons: a finding that the instant taxpayers had a choice of plain, adequate and complete remedies in state court which they, with the exception of Mr. Winicki, did not pursue, Winicki v. Mallard, 783 F.2d 1567, 1570-1571 (11th Cir. 1986); a finding that damage actions, no less than injunctions, contesting state taxing statutes interfere with the rightful independence of state governments, 783 F.2d at 1571; a finding that principles of federalsim upon which the comity doctrine rests require federal court restraint where retroactive relief is being sought, relying on multiple United States Supreme Court decisions denying relief in comparable situations, 783 F.2d at 1571 n. 1; and a finding that a post hoc evaluation of the state's resolution of the controversial tax statute was not proper under the principles of comity. 783 F.2d at 1571.

8. On the collection of taxes under an "illegal" statute: The state taxing statute was found to be unconstitutional in Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982), rehearing

denied, 426 So.2d 547 (Fla. 1983), and the durational residency requirement was expunged from the statute for the 1983 tax year. No taxing official collected the tax for the 1983 tax year or thereafter. Winicki v. Mallard, 615 F.Supp. at 1246.

9. On the availability of a state damage remedy (refund) to taxpayers and on the "refusal" of the federal courts to provide a forum for the instant taxpayers to litigate their right to a federal damage remedy under section 1983: In dismissing the instant taxpayers' actions, the federal courts have consistently and repeatedly found the state remedies to be plain, adequate and complete. Winicki v. Mallard, 615 F.Supp. 1244, 1248 (M.D. Fla. 1985) [noting the state law provisions for administrative review, Sections 194.011 -194.032, Fla. Stat. (1981) and judicial review, Sections 194.171 - 194.231, Fla. Stat. (1981)], aff'd, 783 F.2d 1567, 1570-1571 (11th Cir. 1986) [reaffirming the availability of state remedies]; Osterndorf v. Turner, 505 F.Supp. 175, 176 (M.D. Fla. 1981). Moreover, petitioner/taxpayer herein, Robert John Winicki, has raised his constitutional objections to the statute by filing a Section 1983 damage action in state court on January 4, 1982. Class representative Winicki received a full hearing and a judicial determination in state court, and he received a refund of the taxes he contested. Winicki v. Mallard, 615 F.Supp. at 1246, 1249. (M.D. Fla. 1985).

SUMMARY OF THE ARGUMENT

Rule 17, Rules of the Supreme Court of the United States, prescribes the considerations governing discretionary review by petition for writ of certiorari. Although Rule 17 is not intended to be exclusive, it establishes a pattern which is constructive. To allow the writ, the Court must be persuaded that there is a conflict in the federal law or that there exists

an important, but unsettled, question of federal law which should be settled by the Court. The instant petitioner/ taxpayers cite no conflict in the law and demonstrate the existence of no important, but unsettled, question of law.

This Court in Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100, 70 L.Ed.2d 271, 102 S.Ct. 177 (1981) held "that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts," 454 U.S. at 116. The instant taxpayers' attempt to bring a § 1983 damage action in federal court challenging the constitutionality of a state taxing statute is barred by the principle of comity enunciated in Fair Assessment.

Taxpayers' efforts to avoid the holding in Fair Assessment by arguing that they have no plain, adequate and complete remedy in state court is spurious. Both the district court, Winicki v. Mallard, 615 F.Supp. 1244, 1248 (M.D. Fla. 1985), and the court of appeals, Winicki v. Mallard, 783 F.2d 1567, 1570 (11th Cir. 1986), determined that the complaining taxpayers had plain, adequate and complete remedies to redress the violation of their federal rights in state court. The failure of the purported taxpayer class to pursue their state court remedies does not render them any less sufficient under the law nor does it demonstrate any lack of a remedy. Winicki v. Mallard, 615 F.Supp. at 1249; Winicki v. Mallard, 783 F.2d at 1570-1571. There is no question that Florida courts provide plain, adequate and complete remedies for the protection of federal rights in state tax matters (See cases cited at page 11, supra.

Both the district court and the court of appeals properly concluded, on the facts and the law before them, that the doctrine of comity barred the petitioners' § 1983 action challenging the constitutionality of a state taxing statute in federal court. The petitioners have established no basis for this Court's exercise of its discretionary certiorari jurisdiction; therefore, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

the United States Court of Appeals for the Eleventh Circuit should be denied.

ARGUMENT

In their jurisdictional statement petitioners invoke the certiorari jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). (Petition for Writ of Certiorari at 2). Rule 17, Rules of the Supreme Court of the United States, prescribes the considerations governing review on certiorari, noting that such review is not a matter of right but of judicial discretion and will be granted "only when there are special and important reasons therefor." Further, Rule 17 provides a non-exclusive list indicating the character of reasons that will be considered when a petitioner seeks certiorari review. Essentially, the character of reasons enumerated in Rule 17 involves either a conflict between specified court decisions or the decision of an important question of federal law which has not been, but should be, settled by this Court.

In their discourse titled "Reasons for Allowing the Writ," the petitioner/taxpayers cite no decision which conflicts with that rendered by the Eleventh Circuit Court of Appeals in this action. Moreover, they establish no **important, but unsettled,** question of federal law that should be settled by this Court. Petitioners demonstrate no basis for this Court's exercise of its discretionary jurisdiction. In fact, the true issue presented for review engenders no "special and important reasons" for this Court to issue a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

In Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100, 70 L.Ed.2d 271, 102 S.Ct. 177 (1981), this Court held "that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." 454 U.S. at 116.

This holding controls the real issue presented in this cause, to wit:

> whether the principle of comity bars a taxpayer's 42 US.C. § 1983 damage action brought in federal court challenging the constitutionality of a state taxing statute when the taxpayer had a plain, adequate and complete remedy in state court?

The answer, in accord with Fair Assessment, is yes.

However, in order to circumvent the holding in Fair Assessment, taxpayers cite the "fundamental error" of the court of appeals, arguing that they had no available state damage remedy. (Petition for Writ of Certiorari at 7). This question has been decided by the district court. Winicki v. Mallard, 615 F.Supp. 1244, 1248 (M.D. Fla. 1985), and by the court of appeals, Winicki v. Mallard, 783 F.2d 1567, 1570-1571 (11th Cir. 1986), both of which concluded that there were plain, adequate and complete state remedies, which included the ability to obtain a damage award (a tax refund), available to taxpayers. The lower courts noted, however, that the instant taxpayers, with the exception of petitioner Winicki, did not pursue their state remedies. 615 F.Supp. at 1249; 783 F.2d at 1570-1571. In effect, petitioners seek a second right of appeal on an issue initially concluded against them by the district court and affirmed by the appellate court. Having no sufficient ground on which to invoke the discretionary jurisdiction of this Court, they rehash the merits of their claim.

In this endeavor, petitioners misrepresent the issue at hand, contending that their federal rights were foreclosed because "no state damage action is available." (Petition for Writ of Certiorari at 7). Not only did the two lower courts find that the taxpayers' state damage remedies were available and sufficient, both courts noted that some Florida taxpayers, including petitioner and class representative Winicki, pursued and obtained damage remedies (tax

refunds) after a full hearing and judicial determination of their rights in state court. Winicki v. Mallard, 615 F.Supp. at 1249; Winicki v. Mallard, 783 F.2d at 1570-1571.

Petitioners parade the unsubstantiated horribles that "a state is free to pass tax legislation which violates federal constitutional rights on a massive scale . . . without ever having to concern itself with the possibility of the imposition of a damage remedy . . . by a federal court or . . . by a state court." (Petition for Writ of Certiorari at 7). Such a disingenuous and inflammatory statement ignores, by choice, the tax refunds that were awarded to the litigants before the state courts. Osterndorf v. Turner, 426 So.2d 539, 545 (Fla. 1983).

In a similar and equally misleading vein, petitioners decry their inability to obtain a ruling from **any** court on the merits of their federal constitutional claims. (Petition for Writ of Certiorari at 7-8). Such a statement ignores the state circuit court opinion in Winicki v. Mallard where it was determined that the state taxing statute violated the "right to travel and the equal protection of the laws under the United States Constitution." Winicki v. Mallard, 615 F.Supp. at 1246 (quoting the opinion of the state circuit court). Further, such a statement eschews the obvious: with the exception of peititioner Winicki, the taxpayers herein **never** challenged the taxing statute in state court. 615 F.Supp. at 1249. Finally, and most significantly, this statement begs the question. The Florida Supreme Court found the durational residency requirement of the state taxing statute to be violative of the state constitution and expunged it from the statute permitting all state residents to enjoy the enhanced homestead exemption for the 1983 tax year and thereafter, Osterndorf v. Turner, 426 So.2d 539, 544-545 (Fla. 1983).

At length (Petition for Writ of Certiorari at 8-10), the instant petitioners recite the Court's decision in Fair Assessment regarding the principle of comity, but fail to appreciate the significance of the doctrine. These taxpayers

attempt to cut a hole in the Fair Assessment decision through which their § 1983 damage action based on the alleged unconstitutionality of the state tax statute can slip undeterred by the broad principles espoused by the Court in the Fair Assessment decision. They contend at page 10 of their petition that the Fair Assessment Court announced two impliedly exclusive requirements for the application of the comity doctrine in state tax matters: 1) there must be interference with state fiscal operations by suspending the collection of state taxes until the federal litigation is complete and 2) the federal right must be preserved. It is telling that no citation of authority follows the taxpayers' contention.

The Court in Fair Assessment did not establish such limited and exclusive requirements for the application of the principle of comity to state tax systems challenged in federal court. The so-called "requirements" are but two of the many historical considerations cited by the Court in its discussion of the development and application of federal comity to state tax matters. Other considerations enumerated include avoiding hauling state tax officers into court every time a taxpayer alleges a § 1983 violation, Fair Assessment at 115; and recognizing that the autonomy and fiscal stability of the state survives best when state tax systems are not scrutinized in federal courts, Id. at 114. These are a few of the basic historical considerations recommending the federal courts' exercise of restraint in state tax matters.

Nevertheless, taxpayers contend that because the state no longer collects the tax in question and suspension of same will be unnecessary, there is no interference with state fiscal operations which would trigger the application of the principles of comity. However, the potential intrusive effect on state fiscal operations from such a massive refund sought by these taxpayers on the state's autonomy and fiscal stability was well considered and underscored by the district court in its opinion at pages 1246 and 1248. Likewise, the Florida Supreme Court in Osterndorf v. Turner, 426 So.2d

539 (Fla. 1982), upon declaring the state tax statute here in question to be unconstitutional, also declined to grant statewide retroactive relief to persons not before the court and who had not timely judicially challenged the statute. It did so because of the potentially disastrous budgetary and adminstrative effect on state fiscal operations. Osterndorf, 426 So.2d at 545. Most significantly, the Eleventh Circuit court correctly recognized that the damages sought by petitioners are tax refunds collected under a state statute prior to its invalidation and concluded that even though a state tax statute has been declared unconstitutional and is no longer operational, the principles of federalism underlying the doctrine of comity require federal courts to show restraint where such retroactive relief is sought. 783 F.2d at 1571.

Similarly, taxpayers' reliance on the "requirement" of the preservation of federal rights is not supported by either the facts of law present here. The Fair Assessment Court held that comity bars taxpayers from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers, the Court concluded, must seek protection of their federal rights by state remedies, provided of course, that those remedies are plain, adequate and complete. Fair Assessment at 116. The Court equated the "plain, adequate and complete" remedies of which it speaks with those which are "plain, speedy and efficient" within the meaning of the Tax Injunction Act. Fair Assessment at 116 n.8.

Florida has a detailed statutory scheme providing for taxpayer remedies, (see Chapters 194 and 196, Florida Statutes) and disgruntled taxpayers can pursue their state and federal remedies in the state courts. See Chap. 86, Fla. Stats.; section 194.171, Fla. Stats., and see e.g., Winicki v. Mallard, Case No. 82-35-CA, Div. D. (4th Judicial Circuit, Jacksonville, Duval County, Fla. 1982), aff'd per curiam, 436 So.2d 926 (Fla. 1st DCA 1983); Arney v. State Dept. of Natural Resources, 448 So.2d 1040 (Fla. 1st DCA 1983); Penthouse, Inc. v. Saba, 399 So.2d 456 (Fla. 2d DCA 1981);

Metropolitan Dade County v. Wolff, 274 So.2d 584 (Fla. 3d DCA 1973), cert. denied, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973)[§ 1983 claims were asserted in each of these Florida courts]. The federal courts, in barring federal court review of Florida tax matters, have repeatedly held that Florida court remedies are adequate within the meaing of the Tax Injunction Act, 28 U.S.C. § 1341. E.g., Henry v. Metropolitan Dade County, 329 F.2d 780 (5th Cir. 1964); Carson v. City of Ft. Lauderdale, 293 F.2d 337 (5th Cir. 1961). Finally, as has been pointed out, class representative Winicki probably best exemplifies the adequacy of state court remedies.

What the instant petitioners misperceive is that federal rights are not lost when state courts invalidate state tax laws on state constitutional grounds. The loss, if not rectified, is the inability to be free of an unconstitutional deprivation of a federal right. That the right be restored or redressed is the focus, not the methodology. The history of petitioner Winicki's successful state court litigation demonstrates that federal rights can be preserved in state court and their violation redressed. Winicki v. Mallard, 615 F.Supp. at 1249.

The state court's resolution of the issue in Osterndorf v. Turner provided monetary damages to those before the state court and to those who had timely initiated state court action. It ultimately restored the alleged loss of federal rights to all taxpayers. The taxpayers who failed to avail themselves of adequate state remedies to redress their rights cannot now legitmately claim either a loss of a federal right or the unavailability of a state remedy. See Winicki v. Mallard, 783 F.2d at 1571.

Finally, petitioners futher attempt to restrict the significance of the principle of comity announced in Fair Assessment by their textual reading of footnote 4 of the decision (Petition for Writ of Certiorari at 12-13). They contend, on the basis of the footnote, that the comity doctrine applies only to situations where current operations of state

tax systems are being challenged. The comity doctrine as enunciated in Fair Assessment should not be so narrowly read. Winicki v. Mallard, 783 F.2d at 1571. Comity connotes a "proper respect for state functions." Fair Assessment, 454 U.S. at 112, citing Younger v. Harris, 401 U.S. 37, 44-45; 91 S.Ct. 746, 27 L.Ed.2d. 669 (1971). Even though federal court restraint in state tax matters is based in equity law, historical precedent demonstrates that the doctrine of equitable restraint (comity) was of notable application and carried peculiar force in suits challenging the constitutionality of state tax laws. Such restraint was particularly appropriate because of the delicate balance between the federal authority and the state governments, and the concomitant respect that should be accorded state tax laws in federal court. Fair Assessment, 454 U.S. at 108, citing Boise Artesian Water Co. v. Boise City, 213 U.S. 276, 281; 29 S.CT. 426; 53 L.Ed. 796 1909) and Matthews v. Rodgers, 284 U.S. 521, 525; 52 S.Ct. 217, 219; 76 L.Ed.447 (1932). The damages sought here are a refund of taxes collected under a state statute prior to its invalidation. The principles of federalism upon which the comity doctrine rests requrie federal courts to show restraint where retroactive relief is being sought. Winicki v. Mallard, 783 F.2d at 1571 n. 1 (citations omitted).

The district court and the court of appeals correctly recognized that this concomitant respect is the focus of whether comity bars federal court jurisdiction - not whether the state law is constitutionally challenged on its face or as applied. Winicki v. Mallard, 615 F.Supp. at 1248, aff'd, 783 F.2d at 1571. Both courts properly refused to engage in a post hoc evaluation of Florida's resolution of the controversial statute. 783 F.2d at 1571. In the critical area of state taxation, the proper relationship of the federal forum to the state is governed by the principle of comity. Id. The holding of this Court in Fair Assessment controls the instant action. The instant taxpayers **do not present** the exceptional claim described in the **obiter dictum** of footnote 4 in Fair

Assessment.

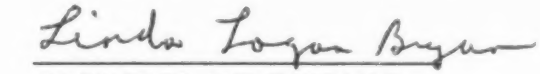
The Eleventh Circuit committed no "fundamental error" as petitioners urge at page 7 of their petition. Instead, the instant taxpayers misunderstand the doctrine of comity. In the instant case, taxpayer and class representative Winicki exemplifies the ability of a state taxpayer, allegedly deprived of federal constitutional rights, to preserve his federal rights through state court remedies. That the class of taxpayers Winicki and Strauss purport to represent have not pursued their state court remedies is of no consequence in the proper application of the principle of comity in the case **sub judice.** The court of appeals correctly held that the doctrine of comity, as expressed in Fair Assessment and derived from the extensive body of law on which the Fair Assessment opinion was based, bars the instant 42 U.S.C. § 1983 damage action challenging the constitutionality of a state taxing statute in federal court.

In exercising the judicial discretion imparted in Rule 17, the Court must determine that there are "special and important reasons" for granting a writ of certiorari. There are none here. Moreover, this Court may take into consideration that a state has already rectified an alleged unconstitutional action, Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 76-77; 99 L.Ed. 897, 901-902 (1954), and that this Court does not sit simply for the benefit of the particular litigants. Rice, 349 U.S. at 74; 99 L.Ed. at 901. Both considerations are proper in the instant case. The instant litigants have established no basis for this Court's exercise of its discretionary certiorari jurisdiction in this cause.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been furnished to **Robert John Winicki, Esquire,** Post Office Box 4099, 100 Laura Street, Jacksonville, Florida, 32201,.by U.S. mail this 27th day of June, 1986.

Linda Logan Bryan

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